STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE: INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL NO. 448, Complainant, - vs - CITY OF HELENA, Defendant.	ULP #19-1978 FINAL ORDER

* *

A Findings of Fact, Conclusions of Law, and Recommended Order were issued on October 18, 1978, by Hearing Examiner, Jack H. Calhoun.

Exceptions of Defendant were filed on November 8, 1978, by Jeffrey M. Sherlock on behalf of the City of Helena.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant to the Findings of Fact, Conclusions of Law, and Recommended Order filed by Mr. Jeffrey M. Sherlock are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law, and Recommended Order of Hearing Examiner, Jack H. Calhoun, as the Final Order of this Board.

DATED this 26 day of January, 1979.

BOARD OF PERSONNEL APPEALS

By: Brent Cromley
Brent Cromley, Chairman

* *

CERTIFICATE OF MAILING

I, Jennifer Jacobson, hereby certify and state that on the 26 day of January, 1979, I mailed a true and correct copy of

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 19-78:

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL NO. 448,

Complainant,

vs.

CITY OF HELENA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

An unfair labor practice charge was filed with this Board on July 13, 1978 by the International Association of Firefighters Local No. 448 (Union) against the City of Helena. Complainant alleged that Defendant violated Section 59-1605 (1)(e), R.C.M. 1947. At a pre-hearing conference held on August 14, 1978 the specific issue was narrowed to the question of whether the City insisted upon bargaining on the composition of the bargaining unit to impasse. A hearing under authority of Section 59-1607, R.C.M. 1947 was conducted on August 29, 1978. Complainant was represented by Mr.Donald A. Garrity. Defendant was represented by Mr. Jeffery M. Sherlock.

The following Findings of Fact, Conclusions of Law and Recommended Order are based upon the substantial evidence in the record including sworn testimony, exhibits and briefs.

FINDINGS OF FACT

1. The International Association of Firefighters Local No. 448 is the certified exclusive representative for the purposes of collective bargaining for the bargaining unit in the City of Helena, Fire Department.

2. The Union has been recognized by the City through previous contracts as the exclusive representative for all employees of the Helena Fire Department except the Fire Chief, the Assistant Fire Chief and clerical employees.

3. On May 3, 1978 the Union requested of the City that

of the existing contract; Section 1 of the contract, was not included among those sections.

4. Section 1 of the existing contract defined the Union exclusive bargaining agent for all employees of the Fire Department except the Fire Chief, the Assistant Fire Chief and clerical employees.

5. On May 9, 1978 the City proposed that Section 1 of th contract be changed to read as follows:

> "The Employer recognizes the Union as the exclusive bargaining agent for all employees of the Fire Department (except for the Fire Chief, the Assistant Chief, the Fire Marshall, the Fire Captains, and clerical employees)."

The proposal also included offers on other sections of the contract.

6. On June 1, 1978 in its counter proposal the Union rejected the City's proposed revision of Section 1; the Union proposed that Section 1 remain unchanged. The Union also made proposals on other sections of the contract.

7. On June 9, 1978 the City made an offer to the Union which included a proposal to change Section 1 to exclude the Fir Chief, Assistant Chief, Battalion Chiefs, Fire Marshal and clerical employees. This offer included proposals on other contract sections and was termed a "final and last" offer by the City negotiator.

8. On June 27, 1978 the City made another offer to the Union, the terms of which were to remove the Fire Marshal from the unit and to include Battalion Chiefs in the unit. This offer also included a proposal on Section 18 of the contract.

9. On June 28, 1978 the Union made an offer to the City by which it proposed that Section 1 remain unchanged. Proposals on other sections of the contract were also set forth.

10. On June 28, 1978, subsequent to the Union's offer of that same date, the City proposed to change Section 1 to exclude

11. On June 29, 1978 the Union proposed that Section 1 remain as in the existing contract. Offers on other sections were included in the proposal.

12. On June 29, 1978 the City made the following proposal on the wording of Section 1:

> "The employer recognizes the Union as the exclusive bargaining agent for all employees of the Fire Department except for the Fire Chief, Assistant Fire Chief, Battalion Chiefs, clerical employees and the Fire Marshal. Provided further that if the "Battalion Chiefs" position as indentified in the case pending before the Board of Appeals is ultimately decided so that the "Battalion Chiefs" position continues in the Billings contract, the City agree to immediately open this section of the contract for the purpose of placing the "Battalion Chief" position in Helena back in this unit."

On the same date the city furnished wage and benefits information to the Union for Battalion Chiefs and Fire Marshal. Such wages and benefits were to be applicable, if the positions were removed from the bargaining unit.

13. On June 30, 1978 the City proposed to exclude the Fire Chief, Assistant Chief, Battalion Chiefs and clerical employees from the bargaining unit. An offer on Section 10 language was made at the same time.

14. On June 30, 1978 the Union made the following proposal on Section 1:

> "Formal recognition exception to read: Except for the Fire Chief, the Assistant Chief, Battalion Chiefs and clerical employees."

The union also made offers on other sections of the contract.

15. On July 11, 1978 at 1:15 p.m. the City proposed to the Union that Captains be excluded from the unit; the remaining wording of Section 1 was to be unchanged. The City also made offers on other sections.

16. On July 11, 1978 at 3:30 p.m. the Union made a proposal on Section 1 which would have left the bargaining unit as it was under the previous contract. Offers on other sections of the

17. On July 11, 1978 at 4:45 p.m. the City made the following proposal to the Union:

> "Sect. 1 Formal Recognition
> The employer recognizes the Union as the exclusive bargaining agent for the fire marshall, captains, lieutenants, firemen first class, firemen, fire inspector and mechanic."

Also included were offers on other sections of the contract.

18. The above proposal made by the City included all positions in the unit which were not excluded from the unit by Section 1 of the previous contract.

19. On July 11, 1978 at 5:00 p.m. the Union offered proposals on various sections of the contract including Section which was to remain as it existed in the previous contract.

20. On July 11, 1978 the Union requested that the City and Union agree to submit "impassed issues" to final and binding arbitration. The following is the body of that request:

> "Firefighters Local Union 0448, Helena request that the City and the Union agree to submit the Impassed Issues, (Section 1. Formal Recognition, Section 10. Department objectives, Section 11. Cost of Living and Salary Adjustment, Section 12, Shift Exchange Section 27. Savings Clause, Section 29. Duration of Agreement) to final and binding arbitration."

21. The City did not agree to submit the unresolved issues to arbitration, nor did it agree that impasse had been reached.

22. On July 13, 1978 the Union filed an unfair labor practice charge against the City.

23. The president of the Union testified that the City made several offers which included all positions which are in the present bargaining unit; that the City had changed the wording of its various proposals on the recognition clause, however, all appeared to him to have the same intent, i.e., to take positions out of the unit immediately or be allowed to later.

24. The City Manager testified that the City had never agreed during negotiations to the present language of Section 1, nor had such an offer been made; that the City intended, by its

recognition clause, to gain the flexibility to create positions outside the bargaining unit; that the City did not intend to take present positions outside the bargaining unit but rather wanted to create, e.g., an assistant chief for operations position.

25. The Union president testified that the statement he swore to in the unfair labor practice charge in which he stated the City had not made a proposal which would include all present members of the unit, was in conflict with the City's proposal made on July 11, 1978 at 4:45 p.m.; but that his understanding was that the proposal did not include all present unit members.

26. On July 24, 1978 at 10:30 a.m. the Union made an offer to the City to leave Section 1 as it was previously and also made proposals on other sections of the contract.

27. On July 25, 1978 the City made an offer to the Union on Section 1 language and on other sections of the contract. The proposed wording for Section 1 was as follows:

> "The employer recognizes the union as the exclusive bargaining agent for the fire marshal, captains, lieutenants, firemen first class, firemen, fire inspector and mechanic. (In addition the union shall give a letter to the City recognizing the City's right to petition the Board of Personnel Appeals for unit clarification.)"

This proposal included all positions not excluded by Section 1 of the previous agreement.

28. On July 27, 1978 the City made offers on various sections of the contract including the following proposal on Section 1:

> "The City recognizes the Union as the exclusive bargaining agent for all employees of the Fire Department except the Fire Chief, Assistant Fire Chiefs, and clerical employees."

The above proposal included all positions in the unit which were not excluded by Section 1 of the previous contract; the city did not plan to create additional positions during the fiscal year; and, the Fire Department had only one Assistant Fire Chief at the time.

remain unchanged; it also made proposals on other sections.

30. On July 28, 1978 the City made the same offer with respect to Section 1 as was made on July 27, 1978; offers by the City on other sections were also made; the proposal on Section 1 included all positions in the unit which were not excluded by Section 1 of the previous agreement; the City did not plan to create additional positions during the fiscal year; and, the Department had only one Assistant Fire Chief at the time.

31. On August 9, 1978 the Union made an offer to the city to leave Section 1 as it was in the previous contract and made proposals on other sections.

32. On August 15, 1978 the City made proposals on several sections including Section 1 which was as follows:

> "The employer recognizes the Union as the exclusive bargaining agent for the fire marshal, captains, lieutenants, firemen first class, fire inspector and mechanic. (In addition, the Union shall give a letter to the City recognizing the City's right to petition the Board of Personnel Appeals for unit clarification.)"

The difference between the above proposal for Section 1 language and the proposal made by the City on July 25, 1978 is the word "firemen" which was left out of the above proposal. The proposal, as written, does not include all positions not excluded by Section 1 of the previous contract.

33. The last negotiations were held on August 15, 1978; up to that time the parties had reached agreement on some of the issues in dispute, however, the language for the recognition clause had not been agreed upon, nor had agreement been reached on some other issues.

34. Throughout the negotiations the City made various proposals to change the wording of Section 1; the City did not ever propose to leave Section 1 as it existed in the previous contract.

of Section 1 as a condition precedent to any agreement; however, the City did not make any proposals which did not include change to that Section.

36. On one occasion the Union indicated a willingness to bargain on the recognition clause; the Union did not since that time offer to bargain on Section 1, i.e., the Union sought to leave the clause as it existed previously.

37. The City Manager did not have authority from the City Commission, at any time, to settle the contract with the previous recognition clause language in it.

38. The City did not join the Union in requesting mediation because the City Manager did not feel impasse had been reached.

RULING ON OFFERED EVIDENCE

The city objected to the introduction of evidence on events subsequent to the filing of the unfair labor practice charge on the grounds that the charge, as filed, did not indicate that the alleged violation was a continuing one. The objection was properly overruled. To hold otherwise would require that Complainant file a charge after each proposal made by the City, if it believed the City was refusing to bargain in good faith. Further, since one of the primary questions raised by the charge was whether the City's conduct relative to negotiations had caused impasse and because impasse is such an ephemeral abstraction, to require the charging party to predict the exact date on which it should file to the exclusion of all future dates would be to impose an undue burden on the party who is alleged to be harmed by the actions of another. This is especially so where, as here, by the very nature of the charge the continuing conduct of the party against whom it is filed is obvious.

The charge by the Union against the City was an alleged violation of Section 59-1605(1)(e), R.C.M. 1947 which states "It is an unfair labor practice for a public employer to:...refuse bargain collectively in good faith with an exclusive representative." Sub-section 4 defines collective bargaining as "...the performance of the mutual obligation of the public employer, or his designated represetatives, and the representative of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession."

Although the Board of Personnel Appeals is not bound by precedents set by the National Labor Relations Board, it is well established that, since the language of our statute is substantially identical to the National Labor Relations Act, NLRB interpretations are valuable and persuasive.

The obligation of a Montana public employer and the public employees' representative under Title 59, Chapter 16, R.C.M. 1947 is to negotiate in good faith on wages, hours, fringe benefits and other conditions of employment. Those four subjects of bargaining are the limits of the parties' statutory responsibility. On other subjects the parties are under no obligation to bargain.

One of the questions raised here is whether the composition or scope of the bargaining unit in the Helena Fire Department represented by the Union is a statutorily mandated subject of bargaining. If it is a mandatory subject, the employer may insist on bargaining to impasse; if it is not a mandatory

so insist. See NLRB v. Wooster Division of the Borg-Warner Corp., 356 US 342, 42 LRRM 2034(1958) where the Court declared, with reference to the NLRA, that:

> "...these provisions [Section 8(a)(5) and 8(d)] establish the obligation of the employer and the representative of the employees to bargain with each other in good faith with respect to wages, hours, and other terms and conditions of employment...The duty is limited to those subjects, and within that area neither party is legally obligated to yield...As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." and further that "good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subject. Each of the two clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it may lawfully insist upon them as a condition to any agreement."

The court held that the recognition clause, on which the employer had insisted upon bargaining, did not come within the definition of mandatory bargaining. As a general rule, it is an unfair labor practice to insist to impasse that employees be added or excluded from a certified unit. If a party insists, as a condition precedent to entering into an agreement, upon a clause which constitutes a permissive subject, it is a per se refusal to bargain without regard to subjective good or bad faith. In Mess Oil and Chemical Corp. v. NLRB, 415 F. 2d 440, 72 LRRM 2132 (1969) the court held that an issue concerning the constriction of an appropriate unit so as to exclude certain members from a unit was not a subject for bargaining and insistence upon it was a violation of the NLRA regardless of whether the unit was a contractual unit or one certified by the NLRB.

The City contends that many of its proposals on the recognition clause did not exclude anyone from the bargaining unit who was included under the old clause. That is true; however, a bargaining unit definition which specifies those to be

specific exclusions. The language in the old clause was to the effect that all employees were to be included except Chief, Assistant Chief and office clerical employees. Such wording was very much to the Union's advantage. No new positions could be created outside the unit without the Union's consent. It was an advantage gained by the Union through certification and/or collective bargaining. Any change in the wording of the clause must meet with the approval of the Union. If the Union did not choose to bargain on the proposed change, it was under no obligation to do so. The City's recourse would appear to be to file a petition for unit clarification under the rules of this Board.

In the instant case there appears to be little dispute over the issue of whether the proposals of the City relative to the recognition clause is a permissive subject. It clearly is not wages, hours or fringe benefits. And, in my opinion, is not a condition of employment; therefore, I must conclude that our statute does not require bargaining on the subject.

Since the City's proposals on the recognition clause are permissive subjects, the parties were free to bargain or not bargain as they saw fit. However, if the City insisted to the point of impasse on bargaining, after the Union refused to bargain on the permissive subject the City has not carried out its obligation under the statute, i.e., to bargain in good faith with respect to wages, hours, fringe benefits and other conditions of employment.

Whether impasse existed is a matter of judgment. By the very nature of the bargaining process it is not always apparent when an impasse has been reached. The facts of each case must be viewed in terms of applicable criteria. Generally, impasse is said to exist when there are irreconcilable differences in the parties' positions after exhaustive good-faith negotiations. After negotiations have been carried on for a period of time, the

stalemate, impasse may exist. The NLRB in Taft Broadcasting Co., 64 LRRM 1387 (1967) set forth the following factors to be considered in deciding whether impasse existed: (1) bargaining history, (2) good faith of the parties, (3) length of negotiations, (4) importance of the issue or issues as to which there is disagreement, and (5) the contemporaneous understanding of the parties as to the state of negotiations.

In applying the above factors to the facts of the present case I find that no evidence is in the record concerning bargaining history except that which took place this year. There is nothing in the record to indicate that the City bargained in bad faith; on the contrary, it appears the City sincerely wanted to enter into an agreement with the Union, if a changed recognition clause could be negotiated. The parties exchanged a total of twenty-two proposals and counterproposals; therefore, the conclusion, with respect to the length of negotiations, must be that they were thorough and exhaustive. And, negotiations were had from early May until mid-August. That the issue in dispute was important to the parties is clear. Both parties as of August 15, 1978, believed they were at impasse and that further progress toward agreement was improbable. The positions of the parties on the recognition clause issue were fixed. Their differences were irreconcilable. They were at impasse as of August 15, 1978 and were still at impasse as of the date of the hearing.

The City argues that its various proposals on the recognition clause, some of which did not exclude any of the present unit members from the proposed unit, in effect, gave the Union what it had under the previous clause. That argument has one flaw - it did not give the Union what it had before, namely an all inclusive unit except for certain specified positions. A recognition clause which lists certain specified inclusions - position by position - and excludes all others is not the

exclusion of a clause which lists certain specified exclusions and includes all others. Under a clause which excludes all but those named the City could create any number of positions outside the unit by simply attaching a non-covered position title to them. However, where those positions which are to be outside the unit are specifically listed and identified the City would not be able to create such positions. That the City made proposals which changed from singular to plural a listed exclusion does not change or alter the fact that it sought to change the recognition clause from one which gave the Union considerable advantage to one which took some of that advantage away. When it became clear that the Union was refusing to bargain on the subject, the City should have dropped the proposal and bargained on mandatory subjects. I conclude that the City's insistence upon bargaining on the recognition clause, in the face of the Union's refusal, is a per se violation of Section 59-1605 (1)(e) R.C.M. 1947 and that its good faith with respect to attempting to reach agreement must be disregarded. The City's insistence upon bargaining on a permissive subject is, in substance, a refusal to bargain about mandatory subjects.

CONCLUSIONS OF LAW

The City of Helena violated Section 59-1605(1)(e), R.C.M. 1947 by insisting upon bargaining on a non-mandatory subject to impasse. Impasse existed on August 15, 1978.

RECOMMENDED ORDER

In accordance with the authority granted this Board under Section 59-1607, R.C.M. 1947, it is hereby ordered that the City of Helena, its officers, agents and representatives shall:

1. Cease and desist from insisting upon bargaining on the subject of the recognition clause or the composition of the bargaining unit represented by the International Association of Firefighters Local No. 448.

2. Cease and desist from refusing to bargain on mandatory subjects which are yet at issue.

3. Take the following affirmative action:

a) Post in conspicuous places in its major place of business and in the fire station copies of the attached notice marked "Appendix." Copies of the attached notice shall be signed by the City Manager and posted immediately upon receipt thereof and shall remain posted not altered, defaced or covered for sixty (60) consecutive days.

b) Notify the Administrator of this Board, in writing, within twenty (20) days from receipt of this decision what steps have been taken to comply herewith.

The Union shall not be reimbursed for legal or other expenses incurred as a result of bringing this charge.

Dated this 18th day of October, 1978.

BOARD OF PERSONNEL APPEALS

By _____
Jack H. Calhoun
Hearing Examiner

CERTIFICATE OF MAILING

I, _____ do hereby certify and state that I did on the 19th day of October, 1978 mail a true and correct copy of the above FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER to the following:

City of Helena
IAFF Local 448

_____